

1 UNITED STATES DISTRICT COURT
2 FOR THE DISTRICT OF NEW JERSEY

3 : CIVIL ACTION NUMBER:
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IN RE: VALSARTAN PRODUCTS
LIABILITY LITIGATION

Mitchell H. Cohen Building & U.S. Courthouse
4th & Cooper Streets
Camden, New Jersey 08101
March 27, 2024
Commencing at 2:01 p.m.

B E F O R E: THE HONORABLE ROBERT B. KUGLER,
UNITED STATES DISTRICT JUDGE

THOMAS I. VANASKIE (RET.)
SPECIAL MASTER

A P P E A R A N C E S:

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A P P E A R A N C E S (Continued):

GREENBERG TRAURIG LLP
BY: TIFFANY M. ANDRAS, ESQUIRE
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For the Defendants Teva Pharmaceutical Industries Ltd.,
Teva Pharmaceuticals USA, Inc., Actavis LLC,
and Actavis Pharma, Inc.

ALSO PRESENT:

LORETTA SMITH, ESQUIRE
Judicial Law Clerk to The Honorable Robert B. Kugler

LARRY MACSTRAVIC, Courtroom Deputy

1 (PROCEEDINGS held via Teams before The Honorable
2 ROBERT B. KUGLER and SPECIAL MASTER THOMAS I. VANASKIE at
3 2:01 p.m.)

4 THE COURT: Good afternoon.

5 Welcome. I hope you can hear me.

6 SPECIAL MASTER VANASKIE: We can.

7 THE COURT: I have a heck of the time with the
8 technology here.

9 Those of you who are not going to speak, could you
10 mute your -- if you haven't already muted your microphones for
11 the time being. I have some things I want to talk about and
12 tell you.

13 Okay. Well, first of all, thank you for your
14 patience, and thank you for your wishes -- your best wishes
15 while I was sick. I am feeling better. You can maybe see in
16 the background that I'm at the courthouse today.

17 I got the letters from Mr. Slater and Mr. Ostfeld. I
18 understand, trust me, the logistical issues that arise from a
19 trial in this matter given where your clients and witnesses
20 are. And I, trust me, have given this a lot of thought.

21 And here's the answers to your questions. And it's
22 not going to be terribly satisfactory, but this is the best I
23 can do.

24 You will not be trying this case this spring. I will
25 not be presiding over this case, a trial, for any longer.

1 After about almost 32 years as a judge, I have decided to step
2 down and retire effective May 31st.

3 I apologize that I wasn't able to get the case done.
4 I had that sweet spot back a couple weeks ago, but I was just
5 too sick to do it. I no longer have the time to do it because
6 of my other commitments and my need to get things wrapped up
7 before I retire.

8 So where does that leave you and this case?

9 I've been in contact with the JPMDL as to what
10 happens next. It is their desire that the case remain in the
11 District of New Jersey. As you may know, the District of New
12 Jersey has the second most MDL cases in the country, so they
13 and I are trying to find a judge who is able to take this on
14 at this time. I think we'll be able to do that, but I don't
15 have final word on who that might be yet.

16 So obviously it will be up to the new judge as to
17 when and even whether to conduct the trial that we were going
18 to have. There's no obligation on the new judge, whoever it
19 might be, to have this bellwether trial or any bellwether
20 trial. He or she may decide to proceed in a different manner.
21 I have no idea. Obviously, I will offer my services to the
22 new judge and tell the new judge where we are in this matter,
23 but it's up to her or him to decide what to do next.

24 Consequently, since there may not be a bellwether
25 trial, I'm going to hold off on your motions in limine, many

1 of which couldn't be decided anyway, anyhow, but I am not
2 going to decide them until I find out who it's going to be and
3 what she or he wants to do hereafter.

4 Just let me take a moment of your time and Judge
5 Vanaskie's time.

6 Almost 50 years ago, I began my first day in law
7 school. I had no idea, no conception, no dream that someday I
8 would have completed the career that I have completed. It's
9 been unbelievably fulfilling for me, and it's been great, but
10 it is time for me to leave. And I know some people out there
11 probably thought it was time for me to leave ten years ago,
12 but I'm here.

13 But one of the things that's made it so rewarding to
14 me, frankly, is you, lawyers. It's been thrilling for me to
15 watch all these years as a judge lawyers do what they do, the
16 intellect and the integrity and the energy that you bring to
17 these problems that we're here to try to resolve.

18 Lawyers are underappreciated in our society. Sure, I
19 mean, when somebody gets in trouble, they know where to go,
20 they've got to find a lawyer. But otherwise, I don't think --
21 I think we get a bad press. I really do.

22 I want you to know how much I've appreciated what all
23 of you have done in this case. This is a difficult case. It
24 was an interesting case. I was really looking forward to
25 trying the case because, frankly, the lawyers in this case are

1 just terrific. And it would have been thrilling to see you in
2 action in this case, but it's not to be.

3 So I'm going to thank you for all you've done, tell
4 you that at least I appreciate all that you do and will
5 continue to do. And I hope that in the future our paths will
6 cross, and you will bring me up to date as to where you are
7 and what you've been doing. And obviously, I will keep in
8 touch with whatever judge has this case to find out what
9 happens.

10 And with that, I'm going to turn this over to one of
11 I think the outstanding judges of this era, Judge Tom
12 Vanaskie.

13 Tom, it's all yours.

14 Good-bye, everybody.

15 SPECIAL MASTER VANASKIE: All right. Thanks, Judge
16 Kugler. Thank you.

17 Okay. Let me just say what a pleasure it's been to
18 work with Judge Kugler. And I'll continue to work until May
19 31st. He's the outstanding jurist in this proceeding. A
20 fantastic, fantastic judge.

21 So we're going to hear argument on this motion for
22 leave to file a second amended answer.

23 Who will be arguing on behalf of ZHP? It's ZHP's
24 motion.

25 MR. MARTIN: It is, Your Honor. And I will, Zachary

1 Martin, Skadden, Arps, Slate, Meagher & Flom.

2 SPECIAL MASTER VANASKIE: All right. And do we have
3 anyone on the phone from the -- I think it's Teva that has
4 moved now to join in this second amended answer? Or motion
5 for leave.

6 MS. ANDRAS: Yes, Your Honor. Yes, Your Honor.

7 SPECIAL MASTER VANASKIE: I'm not going to put you on
8 the spot and call on you today. I just wanted to note for the
9 record that a motion was filed yesterday seeking to join in
10 this particular motion.

11 And I take it also for the purpose of asserting the
12 defenses that ZHP proposes to assert?

13 MS. ANDRAS: That's correct, Your Honor. It's just
14 asking that if the Court were so inclined to grant ZHP leave
15 to amend their answers, that Teva and Torrent would want the
16 same opportunity.

17 SPECIAL MASTER VANASKIE: All right. Thank you.
18 Thank you for that.

19 Now, who will be addressing this matter for the
20 plaintiffs?

21 MR. NIGH: Your Honor, Daniel Nigh for the
22 plaintiffs.

23 SPECIAL MASTER VANASKIE: All right, thanks. Thanks,
24 Mr. Nigh.

25 Well, it's your motion, Mr. Martin, so we'll hear

1 from you first.

2 MR. MARTIN: Thank you, Your Honor.

3 I'd like to start with the merits of the proposed
4 defenses and the futility issue, and then I'll move on to the
5 other amendment factors of timeliness and prejudice. And I'll
6 try to be quick with everything.

7 As Your Honor knows, there are two assignments at
8 issue. The first one is from EmblemHealth and has a New York
9 choice of law clause. I think everyone agrees that the
10 governing law for that one is Section 489 of the New York
11 Judiciary Law which prohibits a corporation from soliciting,
12 buying, or taking an assignment with the intent and for the
13 purpose of suing -- or, excuse me, for bringing an action
14 thereon. And really --

15 SPECIAL MASTER VANASKIE: What's the language in the
16 assignment? The assignment is attached as -- let me look
17 through this binder I have in front of me now.

18 MR. MARTIN: It is, Your Honor.

19 SPECIAL MASTER VANASKIE: Exhibit 1 to the --

20 MR. MARTIN: I'm brining it up right now on my
21 computer as well.

22 SPECIAL MASTER VANASKIE: So what language in that
23 assignment are you relying on to claim that this is a
24 champertous agreement?

25 MR. MARTIN: Your Honor, if I can just pull up the

1 assignment, because I do want to get the language exactly
2 correct.

3 SPECIAL MASTER VANASKIE: Sure. Take your time.

4 MR. MARTIN: Your Honor, I would have a couple
5 answers to that.

6 The first one is on page 1 of the assignment, the
7 second paragraph of the preamble, where it says -- excuse me.

8 Excuse me. I'm sorry, Your Honor.

9 Well, there's actually several places in the
10 assignment that reference litigation, Your Honor, but I think
11 the particular point that we may have cited in our papers
12 is -- comes under the Purpose of Assignment clause, which is
13 paragraph 3 on page 3.

14 The assignor makes and assignee accepts
15 the assignment of the assigned --

16 (Court reporter clarification.)

17 SPECIAL MASTER VANASKIE: I know you're trying to
18 hurry, Mr. Martin, but a little bit --

19 MR. MARTIN: I understand. I apologize,
20 Ms. Mitchell.

21 So it's the first sentence here under paragraph 3 of
22 the assignment. Assignor makes and assignee accepts this
23 assignment of the assigned Medicare claims in order to
24 facilitate assignee's ability to initiate and pursue the
25 recovery of the assigned Medicare recovery claims, including

1 in any litigation, such as but not limited to mass tort
2 actions, class actions and multidistrict litigation.

3 And, Your Honor, I think it's important that if you
4 look at plaintiffs' brief, they quote this assignment a little
5 bit selectively.

6 Your Honor, on page 14 of their brief, they --

7 SPECIAL MASTER VANASKIE: I'll ask you to wait a
8 second. Let me get there.

9 MR. MARTIN: Yes, Your Honor.

10 SPECIAL MASTER VANASKIE: You mean page 11?

11 MR. MARTIN: I mean ECF page 14, which I believe is
12 actually page 10.

13 SPECIAL MASTER VANASKIE: You are correct. Let me
14 get there.

15 All right.

16 MR. MARTIN: So right at the bottom of the page, you
17 can see that they're quoting this as saying: Through methods
18 including, but not limited to, litigation. "But not limited
19 to" is in italics but it's notably not in quotation marks.

20 And so I have looked for that language in the
21 EmblemHealth assignment. I can't find it. As far as I can
22 tell in the assignment, the only --

23 SPECIAL MASTER VANASKIE: But the language is there
24 that says including litigation.

25 MR. MARTIN: It does say including litigation, Your

1 Honor. But I would say that -- well, I would have two answers
2 to that.

3 One is that plaintiffs have to come forward with
4 something more than speculation about what -- about that they
5 might use some other method to recover.

6 SPECIAL MASTER VANASKIE: Why do plaintiffs have to
7 come forward with anything when it's an affirmative defense
8 and it's your burden?

9 MR. MARTIN: Well, Your Honor, it is an affirmative
10 defense and it's our burden to prove at trial, but at this
11 point it's a 12(b)(6) burden. And so I don't think we have to
12 come forward with evidence to prove at this point to sustain a
13 verdict, to survive summary judgment, to submit a case to the
14 jury.

15 But I think that the jury could infer from MSP's
16 business model, from the fact that they have not -- from the
17 fact that they ordinarily sue on these assignments, from the
18 fact that they, as far as I know, did not attempt to collect
19 in any way before filing suit on the assignment, the jury
20 could infer from that that the primary purpose of the
21 assignment was to sue on it.

22 I think a primary purpose question is one that's
23 uniquely -- or not uniquely, but very ill suited for a
24 12(b)(6) analysis, Your Honor.

25 SPECIAL MASTER VANASKIE: So are you suggesting then

1 that there will be discovery to determine whether the primary
2 purpose of this assignment was litigation?

3 MR. MARTIN: I don't believe discovery is necessary,
4 Your Honor. I think that the facts about this are already
5 well established. They're well known. What's disputed is the
6 inferences that could be drawn from those facts. And that's
7 within the realm of the jury, but it is not something that
8 necessarily requires additional discovery.

9 SPECIAL MASTER VANASKIE: Anything else?

10 MR. MARTIN: Well, if I could turn to the Ohio
11 assignment, Your Honor.

12 SPECIAL MASTER VANASKIE: All right.

13 Now, this -- let's go back to the Emblem assignment.

14 This assignment covered a six-year period, as I
15 understand it, from September 29, 2011 to September 29, 2017.
16 So it's not an assignment that concerned only the claims in
17 the valsartan litigation.

18 MR. MARTIN: I agree with that, Your Honor. I don't
19 know that that is dispositive. I understand that most of the
20 cases that arise in this context, certainly the *Justinian*
21 *Capital* case, the *Merrill Lynch* case, do involve specific
22 securities or specific packages of things. This is a broader
23 assignment than most. But I'm not aware of anything in the --
24 in Section 489 that would render that relevant to the
25 champerty question.

1 Turning to the Ohio assignment, if I may now, Your
2 Honor, the SummaCare assignment.

3 SPECIAL MASTER VANASKIE: You may.

4 MR. MARTIN: There are two, as you know from our
5 papers, interrelated issues in Ohio law, but I think the more
6 straightforward one is the -- what we call the contingent
7 interest question that comes out of *West Broad Chiropractic v.*
8 *American Family Insurance*. And I think there's really no
9 daylight between that case and this one.

10 In that case, like here, there -- someone had been
11 injured. They could have -- or had been allegedly injured.
12 They could have brought a suit themselves. They assigned it
13 to someone else prior to doing so but after it had accrued.
14 And the Ohio Supreme Court said, no, if you have not
15 established liability and you have not established damages,
16 that interest is not -- is too contingent to be assigned.

17 And I just think there's no daylight between that
18 case and this one. At the time SummaCare assigned its rights
19 here, they had not established the right to any damages. They
20 had not established any damages. That's why we're going to
21 ultimately have a trial in this case. And so I think *West*
22 *Broad* really controls this case with respect to the SummaCare
23 assignment.

24 But I just want to talk on common law champerty in
25 Ohio very quickly, because plaintiffs argue that

1 Section 1349.55 of the Ohio Code abrogated the common law in
2 that respect, and that's just not true.

3 The statute itself sets disclosure requirements. It
4 says nothing about the common law. We cited the *Hiles* case
5 that postdates the statute and that dismisses on champerty
6 grounds.

7 I'd also point to a case that I'm not sure was in our
8 papers but from Judge Shipp in this court which was brought by
9 these plaintiffs, *MSP v. Abbott Health*, in which the
10 defendants moved to dismiss on the pleadings arguing Ohio
11 champerty. The court denied the motion, but it denied the
12 motion because it's a fact issue, not because champerty no
13 longer exists in Ohio.

14 So if Your Honor has further questions on the merits,
15 I'm happy to answer them. Otherwise, I'd like to move to
16 delay and prejudice.

17 SPECIAL MASTER VANASKIE: Yeah, why don't you move to
18 delay and prejudice.

19 MR. MARTIN: Sure. Thank you, Your Honor.

20 So as to the delay issue, I think we cite case after
21 case in the Third Circuit that says delay alone is not
22 sufficient to justify denial of leave to amend. And even if
23 the delay is the result of attorney inadvertence, even if the
24 court believes that the amendment should have happened or
25 could have happened earlier, that is not by itself

1 determinative.

2 So plaintiffs have to show prejudice, which *Ajax v.*
3 *Fiy* -- excuse me, *Fay* defines as an opportunity to present
4 facts or evidence that would have been offered.

5 Your Honor hit earlier on a common type of prejudice,
6 which is the need to reopen discovery. That obviously has no
7 application here, because even if we pled this in our initial
8 answer in December, discovery still would have been closed, so
9 we would have been in no different of a position with respect
10 to discovery.

11 Plaintiffs point to the fact that they have already
12 filed a motion for summary judgment. Judge Kugler addressed
13 that squarely in *Venuto v. Atlantis Motor Group* where the
14 plaintiff made the same argument. They said, we've already
15 filed a motion for summary judgment, and it's -- it didn't
16 take into account this revision in your pleadings. And Judge
17 Kugler said that's just not enough to overcome the liberal
18 policy in favor of amendment.

19 And I think that's particularly true because nothing
20 would prevent plaintiffs, especially now that we have delayed
21 the trial past this spring, from filing a supplemental motion
22 for summary judgment.

23 So what the issue really is, is that it would require
24 additional work, additional expenditure of funds. And I
25 recognize that, though I don't know how much more difficult it

1 is to file a supplemental motion now than with the previous
2 motion.

3 But, again, *Venuto* says, as do several other cases
4 from the District of New Jersey, that the need to expend
5 additional resources, the need to do additional work, the need
6 in *Venuto*, for instance, to take an additional deposition is
7 simply not sufficient to overcome the preference for deciding
8 these issues on the merits under Rule 15.

9 So that's my presentation. I'm happy to answer any
10 questions Your Honor has. Otherwise, I will rest on our
11 papers.

12 SPECIAL MASTER VANASKIE: We'll hear from Mr. Nigh
13 now.

14 MR. MARTIN: Thank you.

15 MR. NIGH: Good afternoon, Your Honor. Daniel Nigh
16 for the plaintiffs.

17 SPECIAL MASTER VANASKIE: Good afternoon.

18 MR. NIGH: First I'll address why allowing this
19 amendment would be prejudicial to the plaintiffs --

20 (Court reporter clarification.)

21 MR. NIGH: First I'll address why allowing this
22 amendment would be prejudicial to the plaintiffs and then why
23 this amendment would be futile.

24 First, pursuant to CMO 32B, the TPP trial defendants
25 were be obligated to file their affirmative defenses by

1 December 7, 2023. Defendants failed to file these affirmative
2 defenses by that date.

3 Since then, the TPP parties have completed all the
4 summary judgment briefing, and defendants failed yet again to
5 raise these affirmative defenses before the close of summary
6 judgment briefing. They even amended their complaint
7 afterwards and yet again did not seek to include this
8 affirmative defense.

9 Now the Court has issued its order regarding summary
10 judgment.

11 In addition, the TPP parties have completed
12 exchanging their pretrial papers and their trial briefs.

13 Your Honor -- and Judge Kugler has ordered there be
14 no further briefing by the parties for the TPP trial.

15 These affirmative defenses come as a shock to
16 plaintiffs and were hardly mentioned in the thousands and
17 thousands of pages of briefing in this case. Defendants point
18 to one paragraph in a 40-page brief filed nearly two years ago
19 as if this serves as adequate notice to plaintiffs. It does
20 not.

21 Allowing amendment to add these affirmative defenses
22 would lead to a slippery slope.

23 First, plaintiffs would need to be able to file a
24 motion for summary judgment and include a declaration from MSP
25 and its assignors. We suspect that defendants would then

1 insist on deposing the declarants, and I doubt the defendants
2 would agree today not to seek depositions of declarants.

3 Finally, allowing amendment of these affirmative
4 defenses would throw this trial into turmoil and simply serve
5 as a distraction while plaintiffs are preparing for trial as
6 opposed to wasting time and resources on a futile affirmative
7 defense.

8 Now, I want to talk about the futility of this
9 affirmative defense.

10 In order to understand how these affirmative defenses
11 are futile, it's important to understand the nature of these
12 assignments. And I'll raise that this is a contract law
13 issue, not an issue for interpretation by the jury.

14 First, the assignments from SummaCare and Emblem were
15 in 2017 and March of 2018 before any recall of valsartan was
16 announced. These assignments' primary purpose is to be able
17 to recover monies that SummaCare and Emblem paid wherein other
18 sources should have been the primary payer. In fact, that's
19 what the plaintiff's name stands for. It's MSP, which stands
20 for Medicare Secondary Payer Act, and alludes to the 1980
21 Medicare Secondary Payer Act that describes when other
22 insurances are the primary payer and Medicare is the secondary
23 payer.

24 The MSP plaintiff finds situations where these
25 assignors made payments for health coverage that should have

1 been primarily paid by other insurance companies, like car
2 insurance for a car wreck or workmen's comp for a work jury.
3 Once MSP finds these situations, then MSP reaches out to the
4 other insurances, like the car insurance or the workmen's comp
5 insurance, to recover the proceeds that its assignors paid
6 that should have been primarily paid by the other insurance
7 companies. This is referenced all throughout the assignments.

8 In many instances, this recovery can be made without
9 use of litigation. This model that MSP uses is similar to
10 subrogation that many insurance companies use and assignments
11 that mortgage companies use and many other industry --
12 industry companies employ. And, in fact, you can even see
13 them on Emblem page 2 of 17. It discusses how MSP Recovery
14 would use commercially reasonable means when they're
15 available.

16 I'll turn my attention to the applicable law on
17 champerty.

18 First, Ohio law. First, according to Ohio law,
19 champerty was largely abrogated as a defense when the Ohio
20 legislature enacted Section 1349.55. Because champerty and
21 maintenance have been abolished by Ohio legislature, the TPP
22 defendants cannot now raise it as an affirmative defense.

23 Next, the TPP defendants misstate the now abolished
24 Ohio common law affirmative defense of champerty. Under the
25 prior law, champerty was defined as a form of maintenance in

1 which a nonparty undertakes to further another's interest in a
2 suit. MSP is a party to this action, not a nonparty; and,
3 therefore, this now abolished Ohio common law champerty
4 defense would not have applied to the MSP anyways.

5 Next, SummaCare assigned its present rights when they
6 made those assignments, not future rights. Unlike the case
7 law cited by defendants, here the Medicare Secondary Payer Act
8 established liability as to who was responsible for certain
9 payments. That's established, and it's detailed in 1980.
10 That discusses who would be the primary payer. Like in a car
11 accident, the primary payer would be the car insurance
12 company, and then the Medicare company -- the Medicare payer
13 would be secondary in those situations. So that's
14 established. Very different than the sorts of facts that the
15 defendant cited.

16 And so SummaCare assigned its present rights to MSP,
17 which included the right to recover monies that SummaCare
18 already paid that should have been paid by another insurance
19 company pursuant to the Medicare Secondary Payer Act.

20 Now, next I'll turn my attention to New York law.

21 New York law states that champerty is only a defense
22 when the assignment of claims was for the primary and only
23 purpose of pursuing the litigation. Here, the primary purpose
24 of the assignments from Emblem and SummaCare to MSP was
25 clearly not to pursue litigation related to these recalled

1 valsartan medications. The assignments for Emblem and
2 SummaCare were initially entered in 2017, in March of 2018,
3 before any recalls of valsartan were announced in the summer
4 of 2018.

5 Further, the primary purpose of these assignments is
6 not from litigation but rather to recover monies paid by its
7 assignors for healthcare coverage that should have primarily
8 been paid by other insurance companies. This money is often
9 recovered through non-litigation means such as demand letters
10 and other economic recovery means. And the assignment refers
11 to this recovery through commercially reasonable efforts
12 quoted on page 2 of the SummaCare assignment and page 3 of the
13 EmblemHealth assignment.

14 And then I'll just briefly talk about *Justinian* and
15 other case law that the defendants cite from New York.

16 The assignments in those cases are very specific to
17 the litigation that was brought in those cases, which
18 defendants even agree here today, they concede is much
19 different than the situation we're dealing with in this
20 valsartan case.

21 In addition, in *Justinian* and other cases the
22 defendants cite, the timing of the lawsuit was a very
23 important aspect, the timing vis-a-vis the assignment was a
24 very important factor, looked at in both of those cases. The
25 timing of the lawsuit in *Justinian*, they filed a lawsuit days

1 after the assignment was given, so the purpose of it was very
2 clear. There's an assignment, and then right thereafter, days
3 later, there's a lawsuit filed by the party who now held the
4 assignment.

5 Here, that couldn't be further from the truth. I
6 mean, these assignments happened before there was even
7 knowledge about the valsartan claims. And they were present
8 rights, because the MSP parties paid for medications that they
9 shouldn't have paid for because the medications that should
10 never have been sold in the first place. That's the theme of
11 the case -- the theory of the case.

12 So with that, I think at this point, I will wrap up
13 and just say, first, it would be prejudicial to the plaintiffs
14 based on the timing; and, second, it would be futile, even if
15 the amendments were allowed.

16 SPECIAL MASTER VANASKIE: All right. Mr. Martin, any
17 reply?

18 MR. MARTIN: Yes, Your Honor. And I'll be very, very
19 brief on this. I'll touch on prejudice first.

20 This is not an eve of trial case. We don't have a
21 trial date at this point. We didn't have a trial date at this
22 point even before Judge Kugler informed us this morning that
23 he's going to be stepping away. So I think this stands in
24 stark contrast to some of the cases plaintiffs cite.

25 The Third Circuit case they cite, *DLJ Mortgage*, is

1 about an assignment the night before trial is set to begin.
2 So the fact that there may be additional summary judgment
3 briefing, I don't think there needs to be additional
4 discovery, but even if there were additional discovery, that
5 would just take it within the realm of something like *Venuto*,
6 where the prejudice --

7 SPECIAL MASTER VANASKIE: Are you willing,
8 Mr. Martin, to forego depositions of declarants if this matter
9 was to proceed forward and declarations were submitted on
10 behalf of the plaintiffs or on behalf of MSP?

11 MR. MARTIN: Your Honor, it is my suspicion that they
12 would not be necessary, but I am not in a position to obligate
13 our clients for that. I would have to communicate with our
14 trial counsel. And I'm happy to do so and get back to you
15 shortly in writing, if that would be helpful to Your Honor.

16 SPECIAL MASTER VANASKIE: I don't think that's
17 necessary, but please proceed with your argument.

18 MR. MARTIN: So, again, I just would say that trial
19 remains a long way off. This is not the eve of trial. But
20 even if it were, Rule 15(b) actually contemplates amendment
21 during trial. And we cited the *Heyl & Patterson* case, which
22 was an amendment at opening statement.

23 Moving on to the futility or merits of the defense,
24 starting in Ohio, Mr. Nigh said that this case is different
25 because the MSP Act established liability already.

1 This isn't an MSP Act case. This is a state common
2 law case. To the extent liability had been established under
3 the state common law, the exact same thing was true in the
4 *West Broad Chiropractic* case in which state common law
5 presumably established a right to recover based on being hit
6 by the tortfeasor and their insurance company's contract.

7 SPECIAL MASTER VANASKIE: Now, doesn't the fact that
8 this agreement that's at issue here, the assignment agreement
9 or purchase agreement, the fact that it deals with so much
10 more than just the valsartan litigation take this out of the
11 realm of champerty?

12 MR. MARTIN: I don't think so, Your Honor. And as I
13 think I said when you asked before, I don't -- starting with
14 Ohio, I don't see anything in the sort of contingent future
15 interest bucket, the *West Broad Chiropractic* bucket, that
16 changes based on whether you are assigning one contingent
17 future interest or ten contingent future interests or an
18 unknown number of contingent future interests at once.

19 The reality is this is an abnormally large case, but
20 I don't think the principle of *West Broad Chiropractic*
21 changes.

22 With respect to what we'll call common law champerty,
23 I would say the same thing. There is nothing in the
24 definition of champerty under Ohio law and certainly nothing
25 in the text of the Section 489 of the New York Statutes that

1 suggests that the rules change whether you assign one lawsuit
2 or ten lawsuits or an unknown number of lawsuits at one.

3 SPECIAL MASTER VANASKIE: Now, are SummaCare and
4 Emblem parties to this litigation?

5 MR. MARTIN: They are not, Your Honor. But the same
6 could be said of the assignors in either of the Ohio cases.
7 *West Broad Chiropractic*, obviously the assignee was the party
8 to the case. That's the chiropractic clinic that's named.
9 The same would be true of the *Hiles* case in Ohio federal court
10 involving common law champerty.

11 So I don't think the fact that the assignment is
12 complete and that MSP is suing in its own name rather than
13 back seat driving distinguishes it in any way from the cases
14 we cited in our papers.

15 SPECIAL MASTER VANASKIE: Anything else, Mr. Martin?

16 MR. MARTIN: No, Your Honor, unless you have any
17 further questions.

18 SPECIAL MASTER VANASKIE: No, I don't.

19 Mr. Nigh, anything else?

20 MR. NIGH: Yeah. The only thing I'll add is that the
21 primary purpose of the assignment is not about the valsartan
22 case, it's primarily about Medicare Secondary Payer. That's
23 why I cite the 1980 Medicare Secondary Payer Act, which
24 establishes the liability of who would be the primary payer
25 and who would be the secondary payer. That's why the

1 liability established in those cases is much different than
2 the cases that defendants cite in terms of where the liability
3 is still unknown.

4 These assignments assigned present rights where the
5 assignors paid for payments where another insurance company
6 should have been the primary payer. And so those rights,
7 they're already established and the liability is already
8 established pursuant to the 1980 Medicare Secondary Payer Act.

9 SPECIAL MASTER VANASKIE: Thank you for that.

10 I take it this is a motion that I can decide and then
11 you'd have appeal rights to Judge Kugler or to the district
12 judge assigned to the matter?

13 MR. MARTIN: That was my understanding until the ECF
14 notification I got this morning, Your Honor. I got an ECF
15 notification this morning that suggested it was being referred
16 back to Judge Kugler. But I know nothing beyond that.

17 SPECIAL MASTER VANASKIE: Mr. Nigh?

18 MR. NIGH: That was my understanding as well, Your
19 Honor.

20 SPECIAL MASTER VANASKIE: All right. Well, I intend
21 to decide this, and you'll receive a decision from me
22 promptly.

23 Anything else?

24 MR. MARTIN: Not from me, Your Honor.

25 MR. NIGH: No, Your Honor.

1 SPECIAL MASTER VANASKIE: From plaintiffs? All
2 right.

3 Well, thank you all very much. I'll be in touch.
4 Take care. Bye-bye.

5 (Proceedings concluded at 2:38 p.m.)

6 - - -

7 I certify that the foregoing is a correct transcript
8 from the record of proceedings in the above-entitled matter.

9
10 /S/ Ann Marie Mitchell 28th day of March, 2024
11 Court Reporter/Transcriber Date
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